In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 652

FLORIDA POWER CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner, by this cross-petition for a writ of certiorari, seeks review of the same lower court judgment involved in the pending petitions filed by the Gainesville Utilities Department (No. 464) and the Federal Power Commission (No. 469). This cross-petition, however, which presents an issue unrelated to the issue presented by the two earlier petitions,[1] is out of time. Moreover, the issue raised does not warrant consideration by this Court.

1. The judgment of the court below was entered on May 1, 1970. The only further action by the court involved a June 17 order modifying the judgment to eliminate the assessment of costs against the Com-

[1] There were three main areas of controversy before the Commission: (1) the Commission's jurisdiction to order an

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mission. As this modification did not affect the merits of the original judgment, the time for filing a petition for a writ of certiorari expired 90 days after the May 1 judgment unless extended by order of a Justice of this Court. 28 U.S.C. 2101(c); see *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211–212. As no extension was sought and the cross-petition herein was filed after expiration of the 90-day period, this Court is without jurisdiction to consider the cross-petition.

Petitioner's reliance (Pet. 2) upon *Brotherhood of Ry. & S.S. Clerks* v. *Florida East Coast Ry. Co.*, 382 U.S. 1008, 384 U.S. 239, 243, and *Pierson* v. *Ray*, 384 U.S. 938, 386 U.S. 547, 551, appears misplaced. In *Brotherhood*, Mr. Justice Black extended the time within which to file a cross-petition by amending, after the 90-day period had run, a timely extension previously granted to the petitioner to include the cross-petitioner, the order containing the notation "if within

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interconnection between the Florida Power Company and the City of Gainesville, (2) the appropriate terms of payment covering the interconnection and (3) the competition for new retail customers between Gainesville and Florida Power. The Commission's jurisdiction to order the interconnection was upheld below and is not challenged here. The terms upon which the Commission determined the interconnection was to take place were held to be improper by the court below, and that issue is now pending before this Court on the petitions by the Commission and by Gainesville. The instant cross-petition seeks review of the court of appeals' refusal to overturn the Commission's decision not to condition interconnection upon an elimination of competition between the two utilities.

my power to do so." Stern & Gressman, *Supreme Court Practice,* pp. 311–312 (4th ed. 1969). Although both the petition and cross-petition were subsequently granted, the Court did not discuss the timeliness issue. In *Pierson* v. *Ray,* this Court granted a cross-petition filed out of time for which no extension had been obtained. While again the Court did not focus on the jurisdictional issue (which was not raised), the issue raised in the cross-petition was closely related to—and indeed could reasonably be deemed subsumed in—the question presented by the timely petition. The instant cross-petition is clearly distinguishable as it presents an issue wholly independent of the issue raised in the original petitions.

3. There is no merit to the contention that the Commission erred in not conditioning interconnection between Florida Power and Gainesville upon the elimination of competition between the two utilities in certain suburban areas surrounding the City of Gainesville. Under Sections 201(a) and (b) of the Federal Power Act, 16 U.S.C. 824(a) and (b), jurisdiction over retail sales and distribution facilities is left to the states. While in an appropriate case the Commission might condition interconnection upon the parties' negotiation of an agreement upon territorial service restrictions to eliminate duplication of distribution facilities, the determination of what constitutes such an "appropriate case" lies within the discretion of the Commission. In this case, the Commission concluded

that the competition between the two utilities was not of major importance and did not impose an undue burden upon Florida Power (Pet. App. B, 31a). In view of the likely difficulty the parties would have in reaching agreement on the issue, the Commission was of the opinion that the conditioning of interconnection upon such an agreement would unduly delay the consummation of interconnection, which the Commission had found to be in the public interest (Pet. App. B, p. 32a).

The Commission clearly did not abuse its discretion in denying Florida Power the relief from competition it requested and the court below, in upholding the Commission on this point, correctly found that the issue "is not directly related to this case." (Pet. App. A, p. 1a, n. 1).

It is therefore respectfully submitted that the cross-petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

GORDON GOOCH,
General Counsel,
Federal Power Commission.

SEPTEMBER 1970.

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